Eastdec

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DRESSER-RAND COMPANY,
DRESSER-RAND CANADA, INC.,
DRESSER-RAND GROUP, INC.

Plaintiffs,

v. 14 Civ. 7222 (KPF)

INGERSOLL RAND COMPANY,
INGERSOLL RAND COMPANY LIMITED,

Conference

Defendants.

----------x

New York, N.Y.
October 28, 2014
2:00 p.m.

Before:

HON. KATHERINE POLK FAILLA

District Judge

APPEARANCES

ROETZEL & ANDRESS LPA
Attorneys for Plaintiffs
BY: THOMAS L. ROSENBERG

HODGSON RUSS LLP
Attorneys for Plaintiffs
BY: MARGARET M. CMIELEWSKI

DAVID J. GRENELL
Assistant General Counsel
Dresser-Rand Company

SIMPSON THACHER & BARTLETT LLP
Attorneys for Defendants
BY: LYNN K. NEUNER
NOAH M. LEIBOWITZ

(Case called)

MR. ROSENBERG: Good afternoon, your Honor. For the plaintiffs, Thomas Rosenberg. To my right is Margaret Cmielewski, and to my left is in-house counsel David Grenell.

THE COURT: Good afternoon, all of you.

MS. NEUNER: Good afternoon, Judge Failla. Lynn Neuner from Simpson Thacher & Bartlett representing the Ingersoll-Rand entities. With me is my partner Noah Leibowitz. We also have with us here from North Carolina Mr. Pete Donnelly, in-house counsel at Ingersoll-Rand.

THE COURT: Good afternoon. Did you say North Carolina? At a different time in my life I grew up in northern New Jersey, and I understood that Ingersoll-Rand's headquarters to be up in the Montvale area.

MR. DONNELLY: That is true up until the 1970s or so, when it moved down Davidson, North Carolina.

THE COURT: Welcome. Thank you all for coming in today. This might otherwise serve as an initial pretrial conference inasmuch as it is our chance to all get together and talk about the issues in this case, but it is also a pre-motion conference based on the submissions that I received, first from the defense and then from the plaintiffs.

Mr. Rosenberg, I will start with you nonetheless. I have read the complaint and tried very hard to make my way through the agreement in question. I had with greater success

made my way through the parties' submissions with respect to their positions. If there are things that you would like to call my attention to at this time, I would like to hear from you.

MR. ROSENBERG: Yes, your Honor, I shall. Thank you.

The equity purchase agreement is a complicated document that was entered into between the parties, Dresser-Rand's predecessor in interest and Ingersoll-Rand, in connection with various obligations flowing from one to another. We now are challenged with having to apply those obligations to a lawsuit that has been filed up in Saskatchewan where Yara Belle has initiated litigation against Ingersoll-Rand and Dresser-Rand. These two companies, Ingersoll-Rand and Dresser-Rand, decided that their disputes would be determined in the New York courts. That was the decision they made, and that is what we are asking this Court to apply.

Having said that, there are really two issues before us. One is the defense obligation, one is the indemnity obligation. We have spent a lot of time looking at this. We have spent a lot of time analyzing both the legal issues and the practical issues of how we proceed. I believe where we are today with this is we are seeking a declaratory judgment action on both the defense obligations and the indemnity obligations.

THE COURT: When you say "we"?

MR. ROSENBERG: Dresser-Rand, I apologize. Dresser-

Rand is seeking a determination from this Court on the defense obligation and the indemnity obligation.

Briefly on the defense obligation, section 8.1(e) of the equity purchase agreement provides the notice and opportunity to defend. It says opportunity, it doesn't say duty. It says opportunity in that it gives two options to the indemnifying party, Ingersoll-Rand. That is, they can either pick up the defense or, if they don't pick up the defense and there is an indemnity obligation, they owe the defense legal fees.

The defense issue is based on the allegations of the complaint, analogous to the insurance world. The complaint that Yara Belle filed creates a defense obligation. It may not create an indemnity obligation, but it clearly creates a defense obligation based on the allegations. That's what we are asking this Court to determine, that there is a defense obligation.

If there is a defense obligation based on the allegations that Yara Belle has asserted, then Ingersoll-Rand has elected not to employ its own counsel. But we bring in section 8.1(f) of the agreement that says they are to pay the legal fees periodically as incurred. That would be the legal fees of our defense counsel up in the Canadian action. That is the defense issue before this Court.

THE COURT: Following on that, your view is I ought

not get behind the allegations or determine the veracity or think about how a jury might resolve them. I simply should look at the allegations in the Canadian lawsuit, see that if they are taken as true, they would arguably allege something that is indemnifiable, and therefore that implicates the defense obligation but not the indemnity claims?

MR. ROSENBERG: Yes, your Honor, absolutely, very analogous to insurance. If the allegations give rise to the possibility of an indemnity obligation, then Ingersoll-Rand has to pick up the defense.

THE COURT: Let me ask you this question, sir. I was going to ask Ms. Neuner this, but I will ask you first, and then she will know it is coming. The concern that I have is wanting to avoid the possibility of, if you will, stepping on the toes of the Canadian court. Similarly, I want to be careful that I am not impermissibly or inappropriately creating a risk of inconsistent judgments. I understand your argument to me to be, sir, that I need not worry about that now, because I must take the allegations as true for purposes of determining the duty to defend.

MR. ROSENBERG: Yes, your Honor, only limited to the duty to defend separate from the indemnity obligation.

THE COURT: Are you seeking indemnity at this point?

MR. ROSENBERG: Yes.

THE COURT: OK.

MR. ROSENBERG: However, however, the Court is a hundred percent correct, that gets us into the troubled area of stepping on the toes of the Canadian case. It gets us into the challenge of inconsistent determinations. It raises a lot of practical issues, which there is a solution to.

The problem is that these two parties entered into a contract that said that obligation is going to be decided in New York. I believe the solution to that, though, is that what the contract really says is the New York court determines whether there is an indemnity obligation based on what happens in the Canadian court.

THE COURT: Right now not much has happened in the Canadian court.

MR. ROSENBERG: It is moving slowly. I can report on the schedule so that the Court is clearly aware of that. We are in constant contact with counsel up in Saskatchewan.

What happens in the Canadian court is the Canadian court is going to determine basically who is liable for the fire and resulting damages that occurred at the Yara Belle plant, be it Ingersoll-Rand or Dresser-Rand, and they are also going to determine what we would call cross-claim issues. They call it a little different up in the Canadian system. But they would determine cross-claim issues.

Once that determination is made on the indemnity, then, unless one party voluntarily acknowledges the obligation

and compensates the other, it comes back to this Court for this Court to say, based on what happened in Canada, if you two can't agree on indemnity, it's this Court's role to determine whether there is an indemnity obligation.

Therefore, the defense obligation is ripe. The indemnity obligation I think we need to wait and see what happens in Canada.

THE COURT: I want to understand how that works out. I'm not sure that there is a practical difference between the two of. You will explain to me where I'm misperceiving the facts.

The idea of the duty to defend is that you would reach back to Ingersoll-Rand and say under the agreement you have the right of first refusal, as it were, to defend this. But doesn't that, too -- well, you're telling me it doesn't because I just have to go on the facts.

If the duty to indemnify requires more than simply analysis of the pleadings, by allowing the duty to defend or finding a duty to defend in this case, have I not effectively found a duty to indemnify? Because on these facts, on this agreement, the choice is either they can do it themselves or they can pay you back for doing it, correct?

MR. ROSENBERG: Yes, your Honor, to your last comment.

THE COURT: OK.

MR. ROSENBERG: The distinction here is that the duty

to defend and the duty to indemnify are different. The duty to defend is based on the allegations that have been raised in the Yara Belle complaint. The duty to indemnify is based upon the finding in the Canadian court. An indemnification obligation only exists if in fact --

THE COURT: Fair enough. I think I get this. The duty to defend encompasses basically the attorney's fees right now and not necessarily any judgment at some later date, whereas the duty to indemnify includes, if damages are assessed, that plus the costs of defending?

MR. ROSENBERG: Correct.

THE COURT: I understand, thank you. I needed that clarification.

MR. ROSENBERG: As the Yara Belle complaint indicates, the plaintiff's claim is roughly $32 million. The indemnity issue clearly is premature. The defense issue, because of how large that claim is, is ripe, and that is I think what needs to be determined at first.

I will say, with all respect to both the Court and opposing counsel, that is a little different from what we pled in the complaint. We clearly pled in the complaint that the duty to indemnify has to be determined now. We spent a lot of time with Ms. Neuner's arguments. We spent a lot of time looking at that. We are in agreement that it is premature to decide the duty to indemnify now.

THE COURT: While you are in agreement, I want to hear a little bit more about this. My sense from looking at the pleadings and the papers in this case was that, maybe I'm wrong here, the parties were in discussions before your complaint was filed. There was an effort to resolve this dispute short of litigation, correct?

MR. ROSENBERG: Yes, absolutely.

THE COURT: On what other things are the parties in agreement? Anything? What I would like to know is how many issues do I really need to decide? I guess I'm grateful to you for this. You have come forward and said, I've looked at their arguments, and I now agree with a portion of them, and therefore this is our view on this. Is there anything else as to which the parties are in agreement at this time?

MR. ROSENBERG: I don't know.

THE COURT: I guess we will find out from the arguments. Fair enough. I appreciate that, sir. That was a very broad question. I think I really want to know, were you close to resolving this case?

MR. ROSENBERG: No, never on the indemnity issue. Never on the indemnity issue. The parties entered a tolling agreement. The reason they entered into a tolling agreement, which I also think, in all candor to the Court, is probably not at issue at this point, our Canadian counsel made an argument that the case should have been heard in Alberta, not

Saskatchewan. I'm not exactly sure why, but he did. There were certain defenses that were running in Alberta that were not running under Saskatchewan law. In order to preserve those defenses, we entered into the tolling agreement.

They filed what we would consider a motion either to dismiss or change venue from Saskatchewan to Alberta. The court in Canada denied that. Under the Saskatchewan procedure, I think the tolling agreement really becomes irrelevant. So, the case is in Saskatchewan.

I did indicate to the Court I would say a little bit about the schedule as to the Canadian case. They are in the process now of what we would call exchanging documents. They have made a demand for articulation of damages, which is a formal process in that court. Yara Belle has not yet responded to either one of them.

The answer is, obviously, a little bit different. You just submit your defenses. I don't think that has been filed yet. They have some time to do so. I think that is going to be filed in November. Whether we assert a cross-claim against Ingersoll-Rand is really dependent upon what happens today, but I expect that will occur.

THE COURT: Thank you very much. I might get back to you in a few minutes.

Ms. Neuner, will I be hearing from you or from your co-counsel on this?

MS. NEUNER: Your Honor, I will present for Ingersoll-Rand.

THE COURT: Very good. Let me ask you this. It may be that in light of what Mr. Rosenberg has said, some of the things you are going to tell me may have to be modified because you now understand he may be making slightly different arguments. I want to ask you a preliminary question, and then I want to ask you about your argument.

What was a little bit surprising to me, but this just may be my own lack of experience in this particular area, is that it sounded like both sides wanted me to decide the issue and neither side wanted me to stay the matter. That was a surprise to me. Do you want me to decide the defense issue?

MS. NEUNER: No, your Honor.

THE COURT: OK. What I understood from your letter was you want me to find that this is not an indemnifiable event. Correct?

MS. NEUNER: Your Honor, think the thrust of our motion to dismiss is that the entire action is premature. We do not yet have a justiciable case or controversy, because the Canadian action has not determined the basis upon which any loss has been imposed. Do you want me to unpack that?

THE COURT: Please. As you do so, let me have you keep in mind one case. There is a Second Circuit case known as Associated Indemnity v. Fairchild. It stands for the

proposition, in a case involving insurance coverage, which I think is slightly different from what we have here, that the determination of coverage and the determination of whether something is indemnifiable under an insurance contract is a determination that can be made while the action as to which the indemnity claim is being sought is ongoing. There is that. I checked, and that actually gets cited with some frequency.

The question to you was whether there is something about this contract case, because this is not an insurance case, that renders the analysis different.

MS. NEUNER: Your Honor, you are spot-on with all your intuitions. Let me start by saying I think that in today's conference we are making good progress. I, too, am grateful to Mr. Rosenberg for the candor with which he has approached his representations today.

As I understand it, what we now have from Dresser-Rand is an admission that any request about an indemnification of a final judgment up in the northern area of Canada, Saskatchewan, is premature. We absolutely agree with that. The reason why is that one cannot know if Dresser-Rand is going to be found liable in Saskatchewan, if Ingersoll-Rand is going to be found liable in Saskatchewan, if both are, if there is going to be an apportionment of fault, or whether there is going to be a defense verdict. So, literally as to any final judgment, there is no determination as to the basis for that loss being imposed

at this point in time.

Now what I think we need to tackle is the question of this defense. First let me say this. There is a very important philosophical and legal distinction between a contractual duty to indemnify and an insurance policy. I do a lot of insurance coverage work. I am absolutely certain that New York law has decided no more than 300 times that a duty to defend is broader for an insurance policy than a duty to indemnify.

In New York they call it either the four corners rule or the eight corners rule. You would take, as the judge, the four corners of the underlying complaint, here the six-page Yara Belle claims, complaint, put it side by side with the four corners of that policy, and you would search for, as the fact determiner, is there any possible claim for coverage within this Yara Belle complaint that would fit within the corners of the policy, and if so, the insurer has a duty to defend.

Why? Because it's liability insurance. Part of those premiums were for the protection that when an insurer receives the third-party claims, they will have the peace of mind that the insurer is going to step forward and pay their defense costs.

Let's contrast that with the contractual obligation to indemnify, which is what we have here. The context is that this was a purchase agreement between a private equity group,

First Reserve, and Ingersoll-Rand, a diversified strategic company engaged in heavy industrial machinery manufacturing and distribution.

As part of the normal merger and acquisition representations and covenants, you have section 8 indemnification obligations. This is not an insurance policy. In fact, it is quite clear, and you have already picked up on this, that the defense discussion is about an opportunity to defend a products liability loss. It is not an obligation. And Mr. Rosenberg characterized this correctly.

In this situation where Dresser-Rand is making the request for a indemnity to Ingersoll-Rand, Ingersoll-Rand, if it believes that it is responsible for this alleged loss, can, at its election, you said the right of first refusal, come forward, say I'm going to assert a defense, I'm going to appoint Canadian counsel of my selection, I'm going to control the strategic decision-making, where we are going to fight this, whether we are going to settle it. Why? Because Ingersoll-Rand has a determination up front that it is going to be liable for any loss in the end, so it might as well control the picture as it gets down the Canadian litigation track.

However, in this particular situation we do not have a determination by Ingersoll-Rand that is in fact on the hook for the indemnity. Why is that? Because when you look at this Yara Belle complaint, there are three causes of action. Two of

the three, your Honor, are solely against Dresser-Rand, one for negligence on Dresser-Rand Canada's part and the second for breach of contract by Dresser-Rand Canada. Why is that? Because Dresser-Rand Canada was the sole entity that was servicing this expander from 2004 to the time of its failure in August of 2012.

The third claim in the complaint is asserted against both Ingersoll-Rand and the Dresser-Rand entities, and that is essentially a duty to warn. You could read this to say that Ingersoll-Rand is being sued solely for Ingersoll-Rand's actions and alleged duty to warn about the expander's components, and Dresser-Rand is being sued for Dresser-Rand's actions and alleged duty to warn about the components in this expander.

So, in some ways, because the complaint is six pages and is fairly ambiguous, you could say that both entities are being sued for their own individual acts, not Dresser-Rand being sued for Ingersoll-Rand and vice versa. It is simply too early to tell the true theories of the liability there.

But when you go into the EPA, this merger document that was put together ten years ago by my firm and Skadden, you see that the products liability loss has a very important distinction. It says that for a products liability loss, there is an exception in the definition -- your Honor, I'm at 9.10(g) -- an exception for acts or omissions following the

closing. This means that Ingersoll-Rand was saying that following the closing, if there were acts or omissions by Dresser-Rand with respect to the machinery, Ingersoll-Rand was not making that an indemnified claim. It literally was excluded in the definition.

THE COURT: Your argument is not that Ingersoll-Rand no longer had a duty to warn after the closing. You're saying that it had its duty to warn and Dresser-Rand had its duty to warn, but Dresser-Rand was not able post-closing to receive indemnity for any violations of the duty to warn? That's the argument your now making to me?

MS. NEUNER: Yes, your Honor.

THE COURT: OK.

MS. NEUNER: And to the extent Dresser-Rand misper-formed, didn't do a good job in its eight years of servicing of its expander, and if that is the reason for the failure and the fire, that's Dresser-Rand's post-closing acts or omissions for which it is responsible. It is not even within the definition of an indemnifiable claim.

Let me point out to you one other provision, if I could, in the EPA that shores up this thinking. I wouldn't want there to be any misconception that Ingersoll-Rand's indemnity is so broad that it actually would capture post-closing negligence by Dresser-Rand. The point I would bring you to, your Honor, is 8.1 subpart (b). This is the reciprocal

indemnification.

Ingersoll-Rand, when it was selling off Dresser-Rand, said we are going to give you, First Reserve, a duty to indemnify for things preclosing, but when there are things post-closing, if Ingersoll-Rand gets named in that lawsuit, Ingersoll-Rand wants protection.

The buyers, First Reserve, gave an indemnity back to Ingersoll-Rand. Here it specifically says that the indemnity for Ingersoll-Rand, our clients, includes any losses as a result of the conduct of business of any member of the Dresser-Rand group after the closing date. That is Roman (ii) under 8.1.

THE COURT: If you had really good distance vision, you would see that I underlined it in mine. I guess the question is, why is Ingersoll-Rand not seeking indemnification? Or are they?

MS. NEUNER: Your Honor, great question. The indemnity here that you see is from the seller. The seller is First Reserve. First Reserve acquired Dresser-Rand in 2004 and then spun off Dresser-Rand in 2007 in an IPO. We actually have been trying to track down whether this ongoing indemnification obligation in this EPA was transferred from First Reserve to Dresser-Rand at the time of the spin-off. We have asked Mr. Rosenberg for that information, and it has not yet been forthcoming.

It is very, very, very obvious that what you will have here at the end of the day are cross-claims for indemnification. In fact, in Canada, Canadian counsel for Ingersoll-Rand will be putting in its notice of defense and its statement of cross-claim against Dresser-Rand in the Saskatchewan action in the next week. So, the Canadian action will in fact have Ingersoll-Rand's cross-claims against Dresser-Rand before Madam Justice Pritchard, who is the ultimate decision make there.

I think you have rightly determined the risk of proceeding forward with this case, which is stepping on the toes of Madam Justice Pritchard and coming to an inconsistent determination. It could very well be that the ultimate loss, if any, that is borne by Dresser-Rand will be as a result of its own acts and omissions after the closing of this merger, in which case Ingersoll-Rand never, never, never had an indemnity obligation.

The key to this, and I think the barest point of dispute between the parties, is that our contractual indemnification obligation is the same whether the loss that is being sought is defense invoices or resulting judgment. There is no separate duty to defend that is broader than the duty to indemnify.

When you said, if I decided a defense obligation, wouldn't I in fact be deciding an indemnity obligation, you are absolutely right. It's a section 8, which is about

indemnities. Yes, there is this provision which Mr. Rosenberg and I have talked about, which is 8.1(f), which talks about real-time reimbursement of defense fees as they are incurred. But, your Honor, I will point you to the language at the very start that says, "This applies where an indemnified party shall be entitled to indemnification."

That is our central dispute. We do not believe at this point that Dresser-Rand is entitled to indemnification.

THE COURT: Let me ask you this, Ms. Neuner, at the risk of seeming like I'm beating a dead horse or at the risk of seeming that I simply don't understand what is going on here. Are you contemplating a motion in which you ask me to stand down and do nothing until the Canadian courts make some determination here, or are you asking me to make a determination on the four corners or the eight corners, however you would like to look at it, that there can be no indemnifiable event in light of the pleadings?

Both you and Mr. Rosenberg are telling me I can look at the pleadings. I think that's what you are saying. He is saying I look at them and I must find a duty to defend. You are saying I look at them and I can only come to the conclusion that it is a nonindemnifiable event.

MS. NEUNER: Your Honor, I would pull back from there. I'm not going to ask you to actually make a declaratory judgment in our favor. What I would say is this. I think it

is appropriate to dismiss the case at this point because it is nonjusticiable because there are simply not enough facts developed in the Canadian action to determine the basis upon which loss, which is a capitalized term in the EPA, is being incurred. I could ask you to stay it, but I don't think that is wise in terms of your own docket, because the Canadian action could go on for years.

THE COURT: I'll say this. If that is the only thing you are concerned about, I have the ability to basically just add a number to the docket and it goes into a suspense docket. Don't worry about me. That should not be the issue.

MS. NEUNER: OK.

THE COURT: And I am genuinely interested in the issues involved in this case. So don't worry that I would be happy to get it off my docket, no.

I want to be sure that if I have enough information in front of me and should be deciding the issue, that I do, and I can do that in a way that does not offend or friends to the north. Similarly, if I should not be because of the position of that, that's what I would like to know.

We are here today on a pre-motion conference, which to me suggests that a motion is forthcoming. I think it is coming from you.

MS. NEUNER: Yes.

THE COURT: I would like to know what it is. Let's go

that far.

MS. NEUNER: Your Honor, ours is a motion to dismiss for a lack of a justiciable case or controversy.

THE COURT: All right.

MS. NEUNER: I have said this to Mr. Rosenberg. If at the end of the Canadian action liability is imposed on Dresser-Rand for the full amount sought of $32 million and Madam Justice Pritchard makes a finding that it is 100 percent the fault of Ingersoll-Rand, at that point we would have a basis to say this fits within an indemnifiable loss. Then, honestly, you wouldn't be seeing us, because the parties would be able to work that out.

You could put it on the suspense calendar for five years, but it may be that at the end of the Canadian action there is again not a justiciable controversy, because the parties have come to their own conclusion.

Suppose the converse were true. Suppose Madam Justice Pritchard said the judgment is imposed a hundred percent on Ingersoll-Rand but the fault happened July 2012, a month before the fire, because Dresser-Rand somehow made a mistake in the final servicing.

Then we would have justiciable claim for indemnity and it may turn out that it is Dresser-Rand who owes that. If they wouldn't agree to pay, then yes, we do agree that New York is the right forum under the EPA, because we have a concrete

dispute at that point for an entitled indemnifiable loss.

THE COURT: Let me ask this. I want to make sure I'm not getting this wrong. I am looking at the plaintiff's response, and it is on the third page. There is some discussion about the benefits of having both parties in the Canadian case. I think it has been clarified for me today that regardless of how this particular dispute is resolved, Ingersoll-Rand is in that Canadian action any way you look at it. Correct?

MS. NEUNER: Absolutely, your Honor, and the cross-claim will be in that Canadian action.

THE COURT: To the extent the concern would be that both parties need to be up in Canada to figure out how to resolve this perhaps in a way short of five years of litigation, you are talking about you're both in anyway.

MS. NEUNER: Yes, your Honor.

THE COURT: I understand that. Is there anything else? Then I would like to hear back from Mr. Rosenberg.

MS. NEUNER: Your Honor, the only other point that we have that went unaddressed in the opposition letter was the very real argument that we would put into our motion to dismiss that of the amount of loss that Yara Belle seeks, 13 million of it is for property damage for the facility, 19 million, which is roughly two-thirds, is for business interruption losses.

You will note in the EPA at 8.1(g) that the parties

specifically contracted that the indemnity would not apply to special damages. New York law is very clear that business interruption losses are special damages or consequential damages or lost profits. Canadian law literally defines business interruption losses as lost profits.

We have a dispute about 19 million that isn't even within definition of an indemnifiable loss. I say that to you because it is part of our motion to dismiss, and I want to give Mr. Rosenberg a fair chance to respond.

THE COURT: I appreciate that.

MS. NEUNER: Thank you.

THE COURT: Mr. Rosenberg, anything you would like to respond to Ms. Neuner?

MR. ROSENBERG: Yes, your Honor. I'll take them kind of in reverse order.

Starting with the business interruption loss, that is a prime example of something that is decided in the New York court, not the Canadian court, as far as the indemnity obligations of each other. That is something that whether or not New York law applies, the court and the parties determined we are going to let New York law apply, we are going to let that dispute be decided here. It gives a basis for why we have this case here today.

The resolution issue. The Court brought up resolution. I actually think there is nothing we can do about

it, but the issue of resolution up in Canada is going to be extremely difficult under the circumstances, because I think both parties believe they are the smaller payor and the other party is the primary payor. That is going to make that very difficult when we are talking about so much money.

THE COURT: Your argument is not really an argument that I can use, but what you are saying is that as a practical matter, if you were both aligned inasmuch as one of you is covering the costs of the other, you would have perhaps more of an interest to work with each other to see how it can be resolved.

MR. ROSENBERG: Exactly. This is going to be very difficult. I can imagine the two the gentlemen getting in a room saying I'm the minor party, you're the minor party, etc. It's difficult.

Also, why is there a justiciable controversy here? We all can surmise or speculate as to what the Canadian court can do. But the Canadian court can also in its determinations leave us in a position of having immense interpretation by this Court to determine the indemnity obligation.

Yes, they may say Ingersoll-Rand is entirely at fault, they may say Dresser-Rand is entirely at fault, but they could do a host of other things. That is why it is this Court that interprets that decision to determine the indemnity obligations and makes this a justiciable controversy.

THE COURT: I understand. But I think Ms. Neuner's point, and I am neither agreeing nor disagreeing with it, is yes, someday we will have to do that if we can't come to an agreement, but for now it is too soon, is what she is saying.

MR. ROSENBERG: On the indemnity issue, even though in our letter we have cited numerous cases, including the Associated Indemnity case and the Rosen v. Mega Bloks case, which indicates that contractual indemnity obligations is really not a major distinction from the insurance indemnity obligations, what we are saying is yes, separate the indemnity from the defense.

The indemnity this case needs to maintain jurisdiction over and interpret what happens up there whenever it happens. The defense obligation is distinguishable. The defense obligation is in fact a justiciable matter that needs to be determined now based on, as that case law indicates, the allegations in the complaint right now. It could not be in, our opinion, clearer.

Ms. Neuner indicated the various causes of action. Yes, the Yara Belle complaint is very succinct in that regard. There are three causes of action. The second and third cause of action are clearly claims limited to the conduct of Dresser-Rand. We don't believe those claims have merit.

But also that is going to get us into an interpret-ation of the arising out of language in that product liability

definition that is set forth in the EPA. It is our contention that that still arises out of Ingersoll-Rand's efforts of putting it into the stream of commerce.

THE COURT: I'm just asking you to slow down a little bit, sir, for the reporter.

MR. ROSENBERG: I am a New Yorker by heart.

Those second and third causes of action do arise out of Ingersoll-Rand's efforts of putting them in the stream of the commerce. We have a disagreement over the merits of those claims, and I understand that's going to be decided elsewhere.

8.1(b), the indemnity due from Dresser-Rand to Ingersoll-Rand, Ms. Neuner and I will have discussions about the notice issue. That is not before this Court. That will get resolved. That is not a problem. But I don't think that is pertinent to what this Court needs to decide.

This Court needs to look at the other provisions of 8.1 that create the indemnity obligation. I believe what this Court needs to do is maintain jurisdiction over that, to determine what happens in Canada. The defense obligation is ripe, and this Court needs to determine the defense obligation based on the allegations in the complaint at this time.

THE COURT: Thank you.

Ms. Neuner, one quick follow-up question based on what Mr. Rosenberg was saying. If this were not the actual situation where there is a contract between the parties, if

this were an insurer-insured situation, would you agree that the duty to defend could be determined simply based on the pleadings in the Canadian court?

MS. NEUNER: Yes, your Honor, because that is New York law, yes.

THE COURT: It seems to me that one difference between the parties is that you see Associated Indemnity Corporation and things of that type and understand it and limit it to the insurance context and not to this contractual context.

MS. NEUNER: Absolutely, your Honor, because that is the law.

THE COURT: You both have told me what you believe the law is. I understand. As much as I thought that we could possibly resolve this short of a motion, I really didn't think that was going to happen. It doesn't seem that that is the case. While I appreciate very much the nuances that Mr. Rosenberg has announced today, there are still some things that do need to get resolved. So, a motion is in the offing.

Let me look at the calendar. I am ware that there are holidays coming up. My hope is to try and wreck as few of them as possible for people. Ms. Neuner, would you be able to submit something on the 1st of December?

MS. NEUNER: Yes, your Honor.

THE COURT: Mr. Rosenberg, would you be able to submit a response on the 5th of January or the 7th of January?

MR. ROSENBERG: That's fine, your Honor.

THE COURT: 7th of January, all right. Then, Ms. Neuner, that would make your response due the 21st of January, your reply.

MS. NEUNER: Very good, your Honor.

THE COURT: I will ask the parties a couple of things. Number one, please get a copy of today's transcript. I don't need it tomorrow, but I would like to see it in advance of the parties' briefing. There were a lot of very interesting points made today, and I wish to study up on them before I actually get the papers.

Secondly, I don't think on these facts that we need extensions of the page limits. I think you can get your arguments in as need be.

Number three, and this is just perhaps too much to ask, but I'm going to anyway. If there is out there a more legible copy of the purchase agreement, I would love to see it. I have been able to get things downloaded from ECF, but at this point it's been scanned and it is just not as good. If it exists, I would like to have it, but it is not urgent.

MS. NEUNER: OK. We can work together.

MR. ROSENBERG: We can stipulate to the key language of 8, 9.

MS. NEUNER: We will work together to make sure you get one delivered directly to chambers that is a good and

legible copy.

THE COURT: Thank you. I appreciate that indulgence.

I believe that is all of the issues on my list. Hold on one second, please.

I will tell you, although this is a little bit of a formality, I believe our calendar lists an initial pretrial conference for the 19th of November. We will adjourn that. What I will do is issue a scheduling order in the next day or so that has the dates we have just been talking about and also adjourns the pretrial conference for the 19th. Obviously, it is less important now that we have had this conference.

Mr. Rosenberg, is there anything else that you want to call to my attention?

MR. ROSENBERG: No, your Honor. Thank you.

THE COURT: Ms. Cmielewski, you are allowed to speak as well.

MS. CMIELEWSKI: I have nothing to add. Mr. Rosenberg here did a wonderful job.

THE COURT: Ms. Neuner, same thing, anything else?

MS. NEUNER: No, your Honor. Thank you for your time.

THE COURT: Mr. Leibowitz, anything from you, sir?

MR. LEIBOWITZ: Nothing, thank you.

THE COURT: I feel if people are going to sit at counsel table, they ought to have an opportunity to speak. Mr. Grenell?

MR. GRENELL: Nothing. Thank you, your Honor.

THE COURT: Thank you all for bringing these issues to light today and thank you for the attention that you have been paying to the documents and the law in this case. I'm serious when I say these are very interesting issues.

(Adjourned)